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State of New York Public Employment Relations Board Decisions from January 31, 1996

New York State Public Employment Relations Board

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Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

2A- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, WESTCHESTER COUNTY LOCAL 860, WESTCHESTER COUNTY UNIT 9200,

Charging Party,

-and-

CASE NO. U-15859

COUNTY OF WESTCHESTER,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ of counsel), for Charging Party

MICHAEL WITTENBERG, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester County Local 860, Westchester County Unit 9200 (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the County of Westchester (County) violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it passed over a unit employee for promotion because of her exercise of rights protected by the Act.

The charge alleges that on February 14, 1994, a unit employee, Ralph Arce, was appointed by the County as a

Supervising Eligibility Examiner instead of Yvonne Nargi-Martyn;[1/] she was ranked thirty on the civil service list for that title while Arce was ranked thirty-one.[2/] The County's answer did not raise timeliness as a defense. Nonetheless, the ALJ dismissed this aspect of the charge as untimely, because it was filed on August 4, 1994, more than four months after the act complained of in the charge.[3/]

CSEA excepts only to this determination,[4/] arguing that the ALJ was precluded from raising timeliness on her own motion because the County did not raise timeliness in its answer and the untimeliness of this allegation did not become apparent for the

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[1/]Nargi-Martyn has been active in CSEA since at least 1985, first, as a steward, and, at the times relevant to the charge, as a negotiating committee member and as chair of the benefits committee, which reviews employees' health insurance benefits concerns.

[2/]Both had received a score of 80. Employees with tie scores were ranked by the last four digits of their Social Security numbers.

[3/]Rules of Procedure (Rules), §204.1(a)(1).

[4/]The charge also alleges that the appointments through July 29, 1994, of unspecified others from the civil service list to the Supervising Eligibility Examiner title, instead of Nargi-Martyn violated the Act. The appointment of Dora Foy, who was ranked 34 with a score of 79, on December 1, 1994, was raised by CSEA in a March 31, 1994 amendment to the charge. The ALJ found insufficient evidence to support the allegation that others were improperly appointed to the position instead of Nargi-Martin. She also found no evidence of union animus and that the appointment of Foy was based on legitimate business concerns.

first time at the hearing.[5/] The County has not filed a response to CSEA's exceptions.

Based upon our review of the record and consideration of CSEA's arguments, we reverse the ALJ's decision to the extent that it finds the allegations relating to the February 14, 1994 appointment of Arce to be untimely.

The charge was processed by the Director of Public Employment Practices and Representation.[6/] The County did not raise timeliness in its answer as required by §204.3(c)(2) of the Rules. Under those two circumstances, the ALJ could dismiss the charge as untimely only if the untimeliness of the charge was revealed to the ALJ for the first time at the hearing.[7/] No evidence was presented at the hearing to reveal the untimeliness of the charge. The ALJ was not, therefore, permitted under the Rules to raise timeliness on her own motion.

The decision of the ALJ, dismissing as untimely the allegations in the charge related to the February 14, 1994 appointment of Arce, is, therefore, reversed and the matter is

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[5/]Rules, §204.7(1), provides:

> [T]he administrative law judge may dismiss a charge, on the ground that the alleged violation occurred more than four months prior to the filing of the charge, but only if the failure of timeliness was first revealed during the hearing. An objection to timeliness of the charge, if not duly raised, shall be deemed waived.

[6/]Under §204.2(a) of the Rules, the Director is to review and dismiss a charge if he concludes that the violation alleged occurred more than four months before the charge was filed.

[7/]Rules, §204.7(1).

remanded to the ALJ for a decision on the merits of this allegation. SO ORDERED.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2B- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALLEN GRANT BOYAR,

Charging Party,

-and-

CASE NO. U-17075

BUFFALO TEACHERS' FEDERATION, INC.,

Respondent.

ALBERT GRANDE, ESQ., for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Allen Grant Boyar to a decision by the Director of Public Employment Practices and Representation (Director) dismissing his charge against the Buffalo Teachers' Federation, Inc. (BTF). The charge, filed on August 29, 1995, alleges that the BTF breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by failing to pursue, or respond to several requests for the status of, a CPLR Article 78 proceeding against the Board of Education of the City School District of the City of Buffalo (District).

Boyar was notified in the spring of 1992 that he had failed a teacher examination given by the District in October 1991. Boyar wrote to the District in April 1992 to protest the conduct and grading of the interview portion of the examination. The

District rejected his "protest" in June 1992. Boyar or his attorneys regularly contacted the BTF regarding its willingness to commence a proceeding against the District starting in June 1993, and continuing on several dates in 1994 and 1995. The BTF did not respond to any of these inquiries. Boyar filed this charge after his July 29, 1995 inquiry went unanswered.

The Director dismissed the charge as untimely. He concluded that Boyar had to have known that BTF was not going to initiate any proceeding or respond to any of his inquiries long before the charge was filed.

Boyar argues in his exceptions that his charge could not be untimely because there was no date certain from which to identify a violation of the Act because the BTF in bad faith refused to respond to his inquiries.

Having considered Boyar's exceptions, we affirm the Director's decision.

The four months within which an improper practice charge may be filed begins to run when the charging party knew or should have known of the violation alleged in the charge.[1/] Although there is usually a date certain for a violation of the Act, an improper practice can accrue without the conduct complained of having a date certain and the four-month filing period will commence from the date the charging party can reasonably be deemed to have known that an improper practice may have been

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[1/]See, e.g., New York City Transit Auth., 28 PERB ¶3070 (1995).

committed. As this case demonstrates, to hold otherwise would expose parties to litigation years after the alleged violation has been committed. Without having to fix a date certain for violation, Boyar had to have known more than four months before this charge was filed that BTF was not even going to respond to his inquiries, let alone commence a judicial proceeding on his behalf.[2/] The letter sent by Boyar's attorneys to the BTF on December 1, 1993 demands a prompt response to their inquiry and states that an improper practice charge will have to be filed if a response is not received "within a reasonable time". Not only was there no response to this letter, several subsequent inquiries also went unanswered. At the latest, Boyar's filing period began shortly after that December 1, 1993 letter was sent. The charge is untimely as measured from any date on which Boyar could reasonably have expected a response to that letter. When no response to that letter came within a reasonable period of time, Boyar must be deemed to have known that his requests for BTF's assistance were denied. Therefore, the Director properly dismissed the charge as untimely filed.

For the reasons set forth above, the exceptions are denied and the Director's decision is affirmed.

[2/]Unless a different period is prescribed by law, a CPLR Article 78 proceeding must be commenced within four months of the governmental action sought to be reviewed. In this case, that governmental action occurred, at the latest, in June 1992, when the District rejected Boyar's protest.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

OTSELIC VALLEY TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and- **CASE NO. U-16284**

OTSELIC VALLEY CENTRAL SCHOOL DISTRICT,

Respondent.

In the Matter of

OTSELIC VALLEY EMPLOYEES ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and- **CASE NO. U-16285**

OTSELIC VALLEY CENTRAL SCHOOL DISTRICT,

Respondent.

PETER D. BLOOD, for Charging Parties

MARK PETTITT, for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Otselic Valley Central School District (District) to a decision by an Administrative Law Judge (ALJ). On December 21, 1994, the Otselic Valley Teachers Association, NYSUT, AFT, AFL-CIO (OVTA) and the Otselic Valley Employees Association, NYSUT, AFT, AFL-CIO (OVEA) filed identical charges alleging that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act

(Act) when it rescinded its practice of allowing unit employees to care for their own or others' children at their work site during scheduled work hours.[1/] After a hearing, the ALJ held that the District violated the Act as alleged except as to one particular.[2/] In finding the refusal to bargain, the ALJ dismissed the District's timeliness and waiver defenses and its defense that the practice did not embrace a mandatorily negotiable subject. The ALJ also concluded that the practice was not inconsistent with any of the terms of the parties' agreements to which the District might otherwise have been allowed to revert.[3/]

The District takes exception to each of the ALJ's aforementioned determinations. OVTA and OVEA argue in response that the ALJ's decision is correct in all respects and should be affirmed.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

As to the timeliness of the charges, a polling of the board of education members at its meeting on May 18, 1994, which

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[1/]Except for bus drivers, who were allowed to take their own children on their bus runs, the child care ran from approximately 3:05 p.m. to 3:20 p.m., after the end of the students' class day.

[2/]The ALJ dismissed OVEA's allegation that the child-care practice included other than the employees' own children. He found that OVEA unit employees were only allowed to care for their own children, not others' children. OVEA has not taken any exception to this determination.

[3/]See, e.g., Maine-Endwell Cent. Sch. Dist., 15 PERB ¶3025 (1982).

reflected a consensus opinion that the child-care practice should be rescinded effective June 1, 1994, is not an act of impropriety from which the four-month filing period would necessarily begin to run. Whether formal or informal, the May 18 polling was an act taken by the District's legislative body. Actions by a government's legislative body cannot constitute a violation of §209-a.1(d) of the Act because a legislative body has neither the right nor the duty to bargain collectively under the Act.[4/] That duty is lodged with the government's chief executive officer. OVTA and OVEA had no cognizable improper practice until there was executive action to change the former practice. As such, the four-month filing period could not begin to run until the date that agents of OVEA and OVTA knew or should have known that the District's superintendent of schools, Linda Taylor, or her agents, intended to implement the change in practice announced by the board of education on May 18. In support of its claim that both charges are untimely, the District argues that the record shows that Anna de Glee, the high school principal, and Taylor told employees in both units about the change in practice shortly before and after the board of education's May 18 meeting. For the reasons stated below, the conversations relied upon by the District do not establish the untimeliness of either charge.

[4/]See, e.g., City of Lockport, 26 PERB ¶3048 (1993).

Even assuming that de Glee's conversations with unit employees conveyed an unqualified executive intent to implement the board of education's announced change in child-care practice, they were ineffective to start the four-month filing period running against OVEA. There is no evidence that any of these employees held any office or any other agency relation with OVEA. Individual unit employees have no duty under the Act to communicate information given them by their employer to their bargaining agent. To commence the four-month filing period, an employer need only take some action to ensure that some responsible agent of the union has actual or constructive knowledge of a change in prevailing terms and conditions of employment. It is the bargaining agent alone, not the employees, which has the right and duty to negotiate and it alone may challenge the employer's alleged unilateral change in terms and conditions of employment. Individual employees may not bring a §209-a.1(d) charge. Notice to nonagent employees, accordingly, does not start the union charging party's four-month filing period except in those unusual circumstances when notice to employees would constitute constructive notice to the union. The individual meetings which de Glee had with a few employees do not constitute constructive notice to OVEA of a unilateral change in practice. The manner in which the meetings were held and the small number of employees involved would not have put OVEA on notice of the District's intent to implement a change in practice.

In line with the obligation to give notice to the union charging party, the District argues that Taylor told representatives of both OVEA and OVTA at a staff meeting on May 19, the day after the board of education meeting, that effective June 1, the child-care practice would end. Taylor was at that time serving as the elementary school principal and the meeting in question was at the elementary school.

Taylor's testimony, as the District argues, is unrebutted. However, even as unrebutted, it does not establish the untimeliness of either charge. The record shows persuasively that Taylor's executive implementation of the May 18 board of education legislative announcement was tied directly to the board of education's action with respect to that announcement. In that regard, it is unrebutted that at a special June meeting of the board of education, with Taylor in attendance, the president of the board of education announced that the May 18 change was tabled pending further research. What was communicated to OVEA and OVTA representatives before and after that meeting reenforced that Taylor and her agents did not consider the May 18 action to be final.

De Glee, the high school principal, held a staff meeting on May 17. At that meeting, she told the high school staff,

including Patricia Graham,[5/] OVTA president, about what was then an anticipated change in practice. According to Graham's unrebutted testimony, de Glee also told the staff that there was "still a lot of discussion" about it, that it "really wasn't official" and that "she would let us know when we absolutely couldn't have our kids there anymore." Even though made before the May 18 board of education meeting, de Glee's statements conveyed to the staff, including any OVEA or OVTA representatives who were present, that final action regarding the child-care practice was yet to come and that staff would be notified when it came.

De Glee also had conversations with employees after the May 18 board of education meeting which included OVTA president Graham. Although her conversations with the OVEA unit employees were ineffective to commence the four-month filing period, her conversation with Graham might ordinarily be sufficient to start the time for OVTA to file a charge concerning a change in child-care practice. De Glee's statement to Graham in May, however, cannot be considered in isolation and apart from subsequent events.

Taylor told Graham in late June, after the board of education met in special session that month, that the child-care

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[5/]Although Graham's testimony conveys an impression that this staff meeting was after the May 18 board of education meeting, de Glee's testimony was specific that high school staff meetings are held on the Tuesday preceding a regular board of education meeting.

issue was still being researched by the board of education. This conversation with Taylor in June clearly conveyed to Graham that the change in child-care practice had not been finalized. After de Glee's conversation with Graham, teachers continued to have their children in their classrooms after school. De Glee's earlier conversation with Graham, therefore, must be considered to have been superseded by Taylor's subsequent conversation with Graham to whatever extent the two conversations are inconsistent in terms of the finality of the change in child-care practice. It was not until September, at the earliest, that Graham would have known that Taylor considered the child-care change final. Even then, the information was not conveyed to Graham by Taylor but by a unit employee whom Taylor had told could no longer watch her children after school.

Taylor did not inform John Roalef, OVEA's president, until late August that the board of education had made a "final decision" to change the child-care practice in accordance with the May 18 announcement.

In summary, OVEA did not know, nor should it have known, that Taylor was going to implement the May 18 board of education announcement until late August. OVTA had no knowledge in that regard until at least September. As measured from these dates, the District has not shown the charge to be untimely as to either organization and, as it bears the burden of proof on that defense, the ALJ properly reached the merits of the charges.

As to the merits, the child-care practice is clearly an economic benefit to employees. Although the District itself recognizes that the practice has a monetary cost and value, it argues that the practice is not a term and condition of employment because the arrangement was not formal and was not delivered in the context of a day care facility. Neither the degree of formalization nor the delivery mechanism, however, has any bearing on the negotiability analysis, which centers on the nature of the subject matter in issue.[6/] The fundamental nature of the child-care practice which the District ended is economic, clearly embracing aspects of wages and compensation because the employees who availed themselves of the prior practice were saved the cost of alternative child care. Since that monetary savings was made available to them solely by virtue of their employment relationship with the District, the District was obligated to negotiate with OVTA and OVEA before it made any change in that practice, absent some controlling defense.

Turning to the District's remaining defenses, the District argues that ALJ limited its waiver defense to one premised upon OVEA's and OVTA's management rights clause. The District does not take exception to the ALJ's disposition of the management rights issue. It argues only that the ALJ should also have considered a defense grounded upon other contract clauses. The District argues that these other contract provisions are

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[6/]State of New York (Dep't of Transp.), 27 PERB ¶3056 (1994); Johnstown Police Benevolent Ass'n, 25 PERB ¶3085 (1992).

inconsistent with its former child-care practice and, therefore, it had the right to revert to the extent of its contract rights and obligations.

The District's exception in this latter regard is, however, misplaced. The ALJ devoted a large part of his decision to the District's contract reversion defense and he rejected it on the merits. He concluded that the child-care practice was not inconsistent with the District's rights under the contract to assign duties to employees during the scheduled workday. We agree. If and to whatever extent a particular employee fails or refuses to perform required duties because child care prevented the performance of those duties on a given occasion, the District may seek to counsel, warn or discipline such employee, subject to the employee's countervailing rights, whether contractual or otherwise. The possibility that child care may sometimes prove distracting to a particular employee in a particular circumstance and, thereby, prevent that employee from performing required duties in whole or in part is no justification for the unilateral abolition of the practice.

For the reasons set forth above, the District's exceptions are denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the District:

1. Immediately cease implementation of the policy change announced by the board of education on May 18, 1994, and reinstate the child-care practice for both OVTA and OVEA unit employees as it existed prior thereto.

2. Make OVTA and OVEA unit employees whole for any expenses incurred by them as a result of the implementation of the aforementioned policy, with interest at the currently prevailing maximum legal rate.

3. Post notice in the form attached in all locations normally used to post notices of information to employees in the OVTA and OVEA units.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees in the unit represented by the Otselic Valley Teachers Association, NYSUT, AFT, AFL-CIO (OVTA), that the Otselic Valley Central School District (District) will:

1. **Immediately cease implementation of the policy change announced by the District's board of education on May 18, 1994, and reinstate the child-care practice for OVTA unit employees as it existed prior thereto.**

2. **Make OVTA unit employees whole for any expenses incurred by them as a result of the implementation of the policy referenced in paragraph 1 above, with interest at the currently prevailing maximum legal rate.**

Dated . . . . . **By** . . . . . .
(Representative) (Title)

OTSELIC VALLEY CENTRAL SCHOOL DISTRICT

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees in the unit represented by the Otselic Valley Employees Association, NYSUT, AFT, AFL-CIO (OVEA), that the Otselic Valley Central School District (District) will:

1. Immediately cease implementation of the policy change announced by the District's board of education on May 18, 1994, and reinstate the child-care practice for OVEA unit employees as it existed prior thereto.

2. Make OVEA unit employees whole for any expenses incurred by them as a result of the implementation of the policy referenced in paragraph 1 above, with interest at the currently prevailing maximum legal rate.

Dated . . . . . By . . . . . .
(Representative) (Title)

OTSELIC VALLEY CENTRAL SCHOOL DISTRICT

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

2D- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4428

COUNTY OF ONEIDA,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 833,

Intervenor.

RICHARD M. GREENSPAN, P.C. (STUART A. WEINBERGER of counsel), for Petitioner

JOHN S. BALZANO, COUNTY ATTORNEY, for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 833 (CSEA) to a decision by the Director of Public Employment Practices and Representation (Director). Pursuant to a petition filed by United Public Service Employees Union Local 424, A Division of United Industry Workers District

Council 424 (Local 424), the Director held mail ballot elections in the two units of employees of the County of Oneida (County) which the parties stipulated are appropriate. Unit A is a white-collar unit; Unit B is a blue-collar unit. The Director determined that Local 424 had received a majority of the valid votes cast in each election. CSEA filed post-election objections, which the Director denied in a decision from which CSEA now appeals.

Ballots in both units were mailed on August 7.[1/] As agreed by all parties, employees in Unit A who needed a replacement ballot were allowed to telephone PERB from 9:00 a.m. on August 14 through 8:30 a.m. on August 15. The call-in for Unit B employees was from 9:00 a.m. on August 15 through 8:30 a.m. on August 16. Ballots in both units were counted on August 28.

The initial count in Unit A showed that of 1,029 eligible employees, 320 voted for CSEA, 370 for Local 424, 22 for neither and 33 ballots were challenged. The challenges fell into different categories: 13 unsigned ballot envelopes; 6 ineligible voters; 4 voters not on eligibility list; 10 duplicate ballots. As the 33 challenges combined were sufficient in number to affect the results of the election in Unit A, the Director ruled on the 13 challenges to the unsigned ballot envelopes. The Director voided all 13, leaving 732 valid votes cast. Upon that determination, Local 424 had received a majority of the valid

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[1/]All dates are in 1995.

votes cast in Unit A. The Director did not rule on the remaining 20 challenges because they were not sufficient in number to affect the results of the election once the 13 unsigned ballots were voided.

In Unit B, of 414 eligible employees, 122 voted for CSEA, 132 for Local 424, 2 for neither and 7 ballots were challenged.[2/] The 132 votes cast for Local 424 established its majority status, albeit barely, no matter the disposition of the 7 challenges. Therefore, the Director did not rule on any of the 7 challenges in Unit B because they were not sufficient to affect the results of the election.

Having considered the parties' arguments, we affirm the Director's determination that Local 424 has established majority status in both units. The first numbered objection is the only objection filed to the election in Unit A. All of the remaining objections relate to Unit B. By these objections, CSEA seeks to increase the actual or potential number of valid ballots. In affirming the Director, it is necessary to consider only

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[2/]As in Unit A, the challenges in Unit B fell into different categories: 5 unsigned ballot envelopes; 1 ineligible voter; 1 voter not on eligibility list.

objections numbered 1, 3 and 4.[3/] We do not consider CSEA's second-numbered objection or its unnumbered allegation that two ballots, which it claims were mailed to us by the employees, may have been lost or misplaced by the Director. It is our policy and practice to resolve challenges to ballots only to the extent those challenges are sufficient in number to affect the results of the election. Our dismissal of objections numbered 1, 3 and 4 makes it unnecessary to consider the second and unnumbered objections, both pertaining to the election in Unit B, because the number of ballots remaining in issue are not sufficient to affect the results of that election.

OBJECTION NO. 1 (UNIT A)

CSEA alleges that the Director should have sent replacement ballots to the employees who returned their ballot envelopes unsigned before August 18 because there was time for them to vote a replacement ballot before the count on August 28. CSEA alleges that at least ten of the thirteen voters whose ballots were voided in Unit A fall into this category. According to CSEA, the Director's failure to send out replacement ballots to these

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[3/]Objections numbered 1 and 3, as discussed more fully infra, allege that replacement ballots should have been sent to voters who did not sign their mailing envelopes. Objection number 2 alleges that a ballot cast by an employee eligible in Unit B should not have been voided. Objection number 4, again discussed infra, alleges that several persons who called for a replacement ballot never received them. The fifth numbered objection, involving Local 424's alleged use of a facsimile ballot in its election campaign, was dismissed by the Director and no exceptions to that determination have been filed.

employees necessitates a second election.[4/] We, however, affirm the Director's determination on this objection for the reasons he stated and others.

CSEA argues in support of this objection that the sending of replacement ballots in this case would not have been burdensome and is consistent with the National Labor Relations Board's (NLRB) election practice and our own policy to offer an election promoting as large a voter turnout as possible.

The election practice which CSEA asks us to adopt and apply retroactively is contrary to that which has prevailed since we first began holding representation elections in 1967. The parties in this case all understood and agreed before ballots were mailed that replacement ballots would be sent to employees only pursuant to requests they made on the designated call-in days. The instruction to employees to sign the return envelope is clearly stated in the election notices, which are posted throughout an employer's premises, and again in the instructions attached to each individual ballot. In addition, employees are clearly informed on both the election notices and the instructions for voting that a failure to follow those instructions may invalidate the ballot. By making the voting rules clear, we have taken appropriate steps to encourage voter

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[4/]Even if we were to agree with CSEA in this respect, the election in Unit A would not properly be set aside by us. Rather, the case would have to be remanded to the Director for a determination regarding the other challenges.

participation. As CSEA itself points out, 99% of the voters in this case followed the election instructions. It has never been our role to guarantee elections against any and all errors made by the voters themselves. In asking us to serve as a "safety net" for the other 1%, CSEA asks us to assume a burden which is unreasonable for several reasons.

First, any election practice we would adopt in this regard could not be limited to this case alone. A practice under which the Director would undertake to send replacement ballots without request to those mailing unsigned return envelopes would have to apply to all of our elections. The large size of many public sector units would make it extremely difficult to conduct the type of screening of ballots which would be necessary if we were to require the Director to send replacement ballots to employees without their request. All of the ballots cast in an election would have to be screened as received to ensure that any unsigned envelopes were detected and that replacement materials were sent sufficiently in advance of the count date to allow the voter to both receive the replacement ballot and return it. In this case, over 700 ballots were returned and all of those ballots would have to be screened to determine who, under CSEA's argument, would be sent a replacement ballot.

Second, adoption of a practice of sending out unsolicited replacement ballots would likely cause election objections, thereby delaying the resolution of the majority status question

raised by a decertification petition. Elections would be opened to objections, for example, if unsigned envelopes were inadvertently overlooked by the Director during inspection or if the Director were to fix a cutoff date for issuing a replacement ballot which a party could argue was in any way objectionable. There is also in the practice we are urged to adopt by CSEA clear potential for a return of duplicate ballots, itself a ground for challenge to both ballots, and voter confusion stemming from an employee's unsolicited receipt of a replacement ballot which may not have been needed. Furthermore, other grounds for challenge to a ballot might similarly require a screening of ballots if we were to screen for unsigned envelopes. That would require the Director to anticipate challenges which might never be made by the parties.

Finally, we are deeply concerned about an after-the-fact adoption of such an election practice which so completely changes prior election practice. Even if we were inclined to consider the announcement of such a practice in this case, it would not be appropriate to do so except on a prospective basis. Such a change could not in fairness be applied retroactively to serve as a ground for setting aside this election.

We are aware that the NLRB's practice is to send a replacement ballot to an employee who has not signed the mailing envelope if there is sufficient time remaining before the due

date for the return of ballots.[5/] However, the NLRB precedent is not binding upon us and we decline to adopt it by decision.

OBJECTION NO. 3 (UNIT B)

This is the same in substance for Unit B as CSEA's first objection pertaining to Unit A. Under the first numbered objection, we held that the Director properly voided the unsigned ballot envelopes cast in Unit A. The Director's dismissal of this objection is affirmed for the reasons previously stated.

CSEA's objection numbered 2 affects only one ballot and its unnumbered objection affects only two potential ballots. Objection numbered 2 involves a ballot in Unit B cast on pink paper instead of the blue paper being used in the election in Unit B. The voter in Unit B had called in for a replacement ballot on the date set aside for call-ins for Unit A, for which pink election materials were being used. Although included in Unit B, the employee voted a pink ballot because that was what he requested and was issued by the Director. At the count, the election agent realized that the secrecy of the employee's ballot would be compromised if counted because it was the only pink ballot. The ballot was, accordingly, voided by the Director.

In objection numbered 2, CSEA alleges that it did not consent to having the ballot voided and that it should not have been voided. However, as any reversal of the Director would

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[5/]David & Newcomer Elevator Co., 315 NLRB No. 104, 148 LRRM 1044 (1994).

breach the secrecy of the ballot, we would reach this objection only if it could affect the outcome of the election because it is our policy to maintain the secrecy of ballots to the maximum extent possible.[6/] By reaching the outstanding challenges to the five unsigned envelopes in Unit B, and having affirmed, infra, the denial of the fourth numbered objection, the election cannot be affected by the vote referenced in objection numbered 2. By not reaching that objection, any possibility of our violating the secrecy of the one employee's ballot is avoided.

By voiding the five ballots returned in unsigned envelopes in Unit B, the number of valid votes cast is reduced to 258. As previously noted, only a total of three ballots is in issue under objection numbered 2 and the unnumbered objection. Even if we were to accept CSEA's objections in both respects, the number of potential valid ballots would become 261. Local 424's 132 votes establishes its majority status on that tally. Even if it is assumed that all three of these employees did or would have voted for CSEA, it would have received 127 votes, not enough to overturn Local 424's majority status.

OBJECTION NO. 4 (UNIT B)

This objection involves four potential votes. Assuming the four employees' nonreceipt of a replacement ballot is objectionable, that they would have voted had they received a

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[6/]See, e.g., Mohawk Valley Nursing Home, 24 PERB ¶3010 (1991)(subsequent history omitted).

ballot, and that they would have voted for CSEA, the number of potential votes would affect Local 424's majority status. Therefore, not having considered objection numbered 2 or the unnumbered objection, it becomes necessary to reach this objection.

As determined by the Director, and not appealed by CSEA, at most, four eligible employees in Unit B called in for a replacement ballot but did not receive one. Three ballots were returned by the post office as undeliverable because the voters' names were misspelled and/or the addresses were incorrect. The fourth employee's envelope, however, was not returned by the post office. PERB staff prepared the replacement ballot materials from messages left by the employees on a tape recorder triggered by the telephone call. The recorded message instructs a caller to state and spell his or her name and mailing address. None of these callers complied with these instructions. They did not spell their names or mailing addresses; one omitted the city in which he lived. As a result, three of the names were incorrectly transcribed from the message tape. A fourth employee's name was, however, correctly recorded. A replacement ballot was sent to her, but according to a statement she submitted, she did not receive it. Her ballot was the one not returned by the post office as undeliverable.

We need not address the ballot of this fourth employee. Even if she were added to the pool of potential voters, Local

424's 132 votes would still give it the necessary majority status. However, if the three other employees were added to the pool of potential voters, Local 424's majority status would be affected. Therefore, it is necessary to reach the objection as it pertains to the other three employees, all of whom are identically situated in relevant respect.

The replacement ballots sent to the other three employees were inaccurate. The inaccuracies, however, stem entirely from the callers' failure to follow the clear instructions given them. This is conceded by CSEA, but it argues that the Director should have cross-checked the accuracy of the recorded messages by resort to the eligibility list. However, CSEA's argument assumes that the Director in this case knew from listening to the call-in tapes that the information given by the employees was incorrect. The Director's decision states that he had no reason to question the accuracy of the information which had been conveyed by the callers or the transcriptions which had been made therefrom. Moreover, even if the Director suspected that some of the callers' information was unclear or incorrect, resort to the eligibility list would not have served to clarify the ambiguity or correct the mistake. The inaccurately recorded names, of course, did not and would not appear on the voter eligibility list. All three of the call-in names as recorded, inaccurately as that transcription ultimately proved to be, could have been the names of eligible employees in Unit B who simply had been

left off of the eligibility list by mistake. Similarly, the recorded addresses, whether or not accurate from the call-in, cannot serve as a reliable cross-check. A primary reason persons telephone for replacement ballots is that the address on the eligibility list is either wrong or has been changed since the date of preparation of that list. An employee's social security number, although requested in the call-in, does not appear on the eligibility list. In short, there was no way for the Director to have ascertained from the materials in his possession that there were errors in transcription and no way for him to have corrected those errors even if known or suspected by him.

For the reasons and to the extent set forth above, CSEA's exceptions are denied and the Director's decision is affirmed. As Local 424's majority status in Unit A and Unit B has been established, we are this date issuing the appropriate certification. SO ORDERED.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2E- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARIANNE SCHANZENBACH,

Charging Party,

-and-

CASE NO. U-17108

MARLBORO FACULTY ASSOCIATION,

Respondent.

W. JAMES YOUNG, ESQ., for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision by the Director of Public Employment Practices and Representation (Director) filed by Marianne Schanzenbach. Her charge alleges that, in violation of §209-a.2(a) of the Public Employees' Fair Employment Act (Act), the Marlboro Faculty Association (MFA) intends to deduct agency shop fees from her salary in 1995-96 without having the necessary procedures and without having provided her with the necessary notices, disclosures, explanations and audits. Attached to the charge are twenty-two pages of documents consisting of Schanzenbach's letter to the MFA objecting to the deduction of agency shop fees, the agency shop fee reduction calculation for MFA's affiliates, documents sent to

her by MFA regarding the agency shop fee deduction,[1/] and a copy of the advance reduction check sent to her by MFA for the 1995-96 school year.

The Director notified Schanzenbach's attorney that the charge as filed was deficient because it did not specify the procedures and notices alleged to be inadequate. Although on notice from the deficiency letter that the charge would likely be dismissed if the noted deficiency was not corrected, Schanzenbach's attorney refused to make any amendment or clarification because he believed the charge was adequately pleaded, as evidenced by the Director's processing of two of Schanzenbach's earlier charges against the Association which were similarly framed. The Director then dismissed the charge because it did not identify the aspects of MFA's procedures and notices which were alleged to be inadequate. The Director held that the allegations in the charge were conclusory and failed to satisfy the requirements of §204.1(b)(3) of our Rules of Procedure (Rules). That section of the Rules requires that a charge contain "a clear and concise statement of the facts constituting the alleged improper practice . . . ."

Schanzenbach argues in her exceptions that the charge is sufficiently specific and is "nearly identical" to the two

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[1/]The packet included the following: a letter from the MFA briefly explaining Schanzenbach's rights as an agency shop fee payer and asking her to become a member; MFA's refund procedure; and financial statements relating to MFA's state-wide and national affiliates.

earlier charges which the Director processed. Schanzenbach argues that the Director incorrectly required her to set forth a statement of legal position or argument, a requirement not imposed upon charging parties generally and one not previously required of her.

Having considered the exceptions, we affirm the Director's decision.

As the Director correctly concluded, it cannot be determined from the charge what parts of the MFA's refund procedures or the notices and audits issued pursuant thereto are alleged to violate the Act. There is only a general, conclusory allegation that MFA's procedures, notices and audits are "inadequate". This charge can be analogized to one alleging that an employee has been discriminated against because of protected activities. Such a charge would not be processed without an identification of both the specific acts of discrimination imposed upon the employee and the form of the allegedly protected activities. Schanzenbach is not any differently situated than any other avowed discriminatee. Contrary to Schanzenbach's assertion, the Director did not demand an explanation of legal theory or legal argument explaining why MFA violated the Act. He required only an identification of those aspects of the procedures, notices and audits which Schanzenbach was seeking to place in issue. Within the twenty-two pages of procedures, notices and audits could be many separate alleged improper practices. The Director and the

respondent were entitled to know from the charge each of the improprieties being alleged.

The Director's dismissal of this charge is fully consistent with our several decisions dismissing charges pleaded in a conclusory fashion.[2/] These decisions hold that the requirements of §204.1(b)(3) of the Rules are not satisfied by allegations which fail to identify the bases for the violation of the Act alleged. Therefore, there is no merit to Schanzenbach's assertion that the Director singled out her, or agency fee payers generally, for the imposition of a higher pleading burden. Quite the contrary, Schanzenbach's arguments, if accepted, would place agency fee payers in a privileged class, one exempt from the pleading requirements to which all others filing charges are held.

Certain of our decisions do reflect a belief that the pleading requirement in §204.1(b)(3) of the Rules should be liberally construed,[3/] particularly in light of a respondent's right under §204.3(b) of the Rules to move for particularization of the charge.[4/] Our liberal construction of the pleading requirements as pertaining to a charge, however, has never

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[2/]City Sch. Dist. of the City of New York (Gerstenfeld), 28 PERB ¶3017 (1995); City Sch. Dist. of the City of New York (Assante), 27 PERB ¶3072 (1994); State of New York (Div. of Parole), 27 PERB ¶3016 (1994); Centro, Inc., CNY (Ensworth), 17 PERB ¶3035, aff'g 17 PERB ¶4520 (1984).

[3/]Wappingers Cent. Sch. Dist., 28 PERB ¶3016 (1995).

[4/]Civil Serv. Employees Ass'n (Dennis), 26 PERB ¶3059 (1993).

reached the point of sacrificing other provisions of the Rules or leaving a respondent totally in the dark regarding the violations alleged against it. Schanzenbach's interpretation would compel such sacrifice and would effect such a result, neither of which we find acceptable.

The Director is required under §204.2 of the Rules to make a determination on receipt of the charge as to whether the charge is untimely or lacking legal merit. Without the minimal specification the Director required of Schanzenbach, it would not be possible for him to make the review required by our Rules. That initial review becomes meaningless if the Director is forced to process charges stated in the same conclusory manner as was this charge. Without knowing which aspects of MFA's procedures and notices were alleged to be "inadequate", he could not know whether and which of those allegations were timely and he could not determine whether the alleged "inadequacies" set forth an arguable violation of the Act.

Similarly, respondents would be all but forced to move to particularize such charges as a matter of routine practice. The particularization rules, however, are intended to be applied in exceptional circumstances. We will not issue a decision which would make such motions the rule, not the exception. Under Schanzenbach's interpretation of the pleading requirements, the burden of clarification of a deficient charge would fall entirely upon a respondent. A respondent has its own pleading burdens and

it is unreasonable to expect it to shoulder, in addition, the charging party's.

Even were a respondent not to move for particularization of the charge, its only alternative, not knowing the allegations against it, would be to file an answer generally denying any violation of the Act. Section 204.3(c) of the Rules requires specificity and detail in an answer, which a general denial does not supply.

An examination of the relative burdens is also relevant to our analysis. Requiring Schanzenbach to simply identify the aspects of the procedures and notices she wished to contest did not impose any hardship upon her. Weighing the slight imposition on her against the significant adverse effects which would be occasioned by the processing of charges pleaded in conclusory fashion further supports our rejection of Schanzenbach's interpretation of the pleading rules.

Left for consideration is whether our decision should be different because the Director processed two of Schanzenbach's earlier charges. We have reviewed those other charges and conclude that those charges, as amended, were at least substantially similar to the charge as it was filed in this case. Schanzenbach argues that the Director was required to process this charge as filed because it is the same in all relevant respects as the charges which he processed previously. We do not agree with this assertion.

Those earlier charges perhaps should not have been processed without further amendment for they also pleaded only a general inadequacy of agency fee procedures, notices and audits. Schanzenbach, however, cannot profit from the Director's processing of those earlier charges.

When the charge was filed, Schanzenbach had a basis to believe that the charge was properly pleaded. On receipt of that charge, the Director notified Schanzenbach that the charge was deficient as pleaded. She was put on notice of the specific nature of that deficiency and informed of the likely consequences if the deficiency was not corrected. At that point, Schanzenbach could no longer reasonably conclude that this charge was pleaded in sufficient detail. To process this charge would mean that, once having processed a deficient charge, the Director forever thereafter would be required to process similar deficient charges. That result would, much like Schanzenbach's interpretation of the pleading requirements, render meaningless the Director's required screening of charges as they are filed. Moreover, those earlier charges were not brought to us for review on exceptions. We surely are not required to issue a decision we believe to be incorrect simply because the Director issued rulings in earlier charges which were not appealed to us. In refusing the Director's demand for some minimal specification, Schanzenbach, on notice of the consequences, risked the Director's dismissal of the charge and our affirmance on appeal, and she is bound to the results of the choice she made.

For the reasons set forth above, the exceptions are denied and the Director's decision is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2F- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUFFOLK COUNTY CORRECTION OFFICERS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-14176

COUNTY OF SUFFOLK AND SHERIFF OF SUFFOLK COUNTY,

Respondent,

-and-

SUFFOLK COUNTY DEPUTY SHERIFFS BENEVOLENT ASSOCIATION,

Intervenor.

MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK of counsel), for Charging Party

RAINS & POGREBIN, P.C. (RICHARD K. ZUCKERMAN of counsel), for Respondent

AXELROD, CORNACHIO, FAMIGHETTI & DAVIS (WAYNE J. SCHAEFER of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Suffolk County Corrections Officers Association (Association) to a decision by an Administrative Law Judge (ALJ) dismissing its charge. It is alleged that the County of Suffolk and the Sheriff of Suffolk County, as the joint employer (County), had violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) by unilaterally reassigning the care and custody of detainees at the District Court detention facility from the

correction officers unit to deputy sheriffs. The deputy sheriffs are in a unit represented by the Suffolk County Deputy Sheriffs Benevolent Association (DSBA), which intervened in the proceeding.

The ALJ found that although the work transferred to the deputy sheriffs was substantially similar to the work previously performed by the correction officers, the Association had failed to establish that the correction officers had performed the work exclusively.

The Association excepts to the ALJ's decision, arguing that the ALJ erred in several regards in finding no exclusivity and that she failed to address the County's failure to bargain the impact of its transfer of work. The County and the DSBA argue in response that the ALJ's decision is correct and should be affirmed.

After reviewing the record and considering the parties' arguments, we affirm the decision of the ALJ.

The ALJ found that, from 1973 to 1993, deputy sheriffs were responsible for the transport of the detainees to and from the District Court detention facility and, until 1985, had guarded the detainees when they were actually in court.[1/] During the 8:00 a.m. to 4:00 p.m. shift, correction officers had responsibility for the care and custody of the detainees while

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[1/]In 1985, court officers assigned to the courtroom took custody of the detainees when they were actually in the courtroom. Deputy sheriffs continued to escort the detainees to and from the courtroom and the holding cells.

they were in the holding cells at the facility. This included handcuffing, fingerprinting, and searching the detainees, as well as staffing the booking desk, handling intake, inventorying property, doing related paperwork and answering the phone. However, deputy sheriffs were sometimes assigned, and frequently volunteered, to work in the detention facility during the 8:00 a.m. to 4:00 p.m. shift when the correction officers were short of staff or were on breaks.[2/] From 4:00 p.m. to 8:00 a.m. on Mondays through Fridays and all day Saturday and Sunday, the holding cells were staffed by deputy sheriffs.[3/] The District Court DWI facility was staffed on Friday nights and weekends by both correction officers and deputy sheriffs. The deputy sheriffs were and continue to be solely responsible for the care and custody of detainees at Family Court, County Court and Supreme Court and, with the correction officers, are responsible for detainees and inmates from either the courts or the correctional facilities who are hospitalized.

In January 1993, the District Court facility was moved to a new building. At that time, deputy sheriffs were assigned full

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[2/]When short of correction officers in the District Court detention facility, overtime was regularly offered to the correction officers and deputy sheriffs who were assigned to the District Court. Correction officers are not utilized to fill deputy sheriff vacancies.

[3/]Even though their shift ended at 4:00 p.m., often corrections officers would stay on duty until court recessed, sometimes as late as 6:00 or 7:00 p.m., and would staff the holding facility along with the deputy sheriffs who came to work at 4:00 p.m. for the night shift at the District Court.

responsibility for the detainees at the new District Court facility.[4/] The eighteen correction officers who had been assigned to the District Court were reassigned to the County correctional facility in Riverhead.

To establish a violation of §209-a.1(d) of the Act, it must be established that the work that has been transferred out of the unit is substantially the same as the work that was performed by unit employees. That is not in dispute here. However, a violation will not be found unless the work that has been transferred has been historically and exclusively performed by unit employees.[5/] The Association urges that a discernible boundary can be drawn around the care and custody of District Court detainees during the 8:00 a.m. to 4:00 p.m. shift so as to establish the Association's exclusive control over that work. Even if we were to agree with such a narrow definition of unit work, it is clear from the record, as the ALJ found, that the deputy sheriffs have regularly been assigned, or have volunteered, to work in the District Court detention facility and to perform the same functions as the correction officers during the day shift. Without objection from the correction officers that some of the work was performed by the deputy sheriffs on a voluntary basis and was done primarily when the correction officers were not available does not require a contrary

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[4/]The County's decision was prompted by, among other financial factors, the large amount of overtime being paid to correction officers because of a shortage of correction officers at the correctional facilities.

[5/]Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

conclusion, as the assignments were not made at the sufferance of the Association.[6] Unlike Long Beach, supra, the deputy sheriffs were used at times when correction officers were available, albeit from the other County facilities, to perform the duties regularly assigned to correction officers at the District Court. The County's regular use for over twenty years of deputy sheriffs during the day shift at the District Court detention facility to perform the same duties as the correction officers establishes that the care and custody of District Court detainees has never been the exclusive work of correction officers. Therefore, the County's unilateral decision to assign that work to deputy sheriffs at the new District Court does not violate §209-a.1(d) of the Act.[7]

As to the Association's argument that the ALJ erred in not finding that the County violated the Act by refusing to negotiate the impact of its decision to reassign the work in issue to the deputy sheriffs, the failure to negotiate impact is not pled as a violation in the Association's improper practice charge. Neither does the charge allege that the Association ever made any demand of the County to negotiate impact. As that alleged violation was not before the ALJ, it was proper for her to make no findings as to the negotiation of the impact of the County's decision.

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[6]Bd. of Educ. of the City Sch. Dist. of the City of Long Beach, 26 PERB ¶3065 (1993); County of Erie, 17 PERB ¶3067 (1984).

[7]No exceptions were filed to the ALJ's dismissal of the alleged violation of §209-a.1(e) of the Act.

Based on the foregoing, the Association's exceptions are denied and the decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2G- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, RENSSELAER COUNTY LOCAL 842, CITY OF TROY UNIT,

Charging Party,

-and-

CASE NO. U-16055[1/]

CITY OF TROY,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT and JANNA PFLUGER of counsel), for Charging Party

PETER KEHOE, CORPORATION COUNSEL (BRYAN J. GOLDBERGER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Troy (City) to a decision of an Administrative Law Judge finding that it had violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it took certain unilateral actions with respect to its employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Rensselaer County Local 842, City of Troy Unit (CSEA).

[1/]Case No. U-16055 was consolidated with Case No. U-16470 for hearing and decision below. No exceptions are before us in Case No. U-16470.

The ALJ found that the City had violated the Act when it unilaterally changed its pay periods from weekly to bi-weekly, changed the day on which employees received their paychecks, and imposed a one-week lag payroll on unit employees.[2/] The City also was held to have violated the Act when it unilaterally eliminated[3/] thirty minutes of break time previously enjoyed by unit employees,[4/] when it unilaterally denied access to CSEA representatives to communicate with unit employees in City Hall, and when it refused to provide information requested by CSEA regarding the layoff of unit employees.

The City's exceptions address only two aspects of the remedy ordered by the ALJ. It argues that the ALJ's order to reinstate the weekly payroll period, rescind the bi-weekly and lag payroll, and make the unit employees whole for any pay which was lagged is punitive because of the City's financial condition. It further argues that the ALJ's order restoring the thirty minutes of break time and directing the City to compensate unit employees who worked the thirty minutes a day after the breaks were abolished is overly broad because it is applicable to all unit employees, some of whom may not have been entitled to or utilized breaks

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[2/]This action was effective pursuant to the City's memorandum of September 23, 1994.

[3/]The City's memorandum prohibiting all unit employees from taking a break during the workday was dated September 22, 1994.

[4/]The time was taken in two, fifteen-minute breaks, one in the morning and one in the afternoon, or in one, thirty-minute break in the morning.

before the ALJ's order and because it is impossible to identify the unit employees who stopped taking breaks after the City unilaterally abolished them. The City argues that this aspect of the order is also punitive because of the City's financial condition.

CSEA supports the ALJ's decision except for one cross-exception. CSEA argues that the ALJ's order restoring the breaks is, by its terms, applicable only to unit employees in certain departments in the City. This, CSEA argues, is too restrictive since the City's memorandum was directed to all employees and the benefit denied was extended unit-wide.

After a review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ, with modification.

As to the City's institution of the bi-weekly payroll and the one-week lag in pay, the City excepts only to the ALJ's order requiring that the weekly payroll be reinstated and that the unit employees be "made whole" for any pay which was "lagged", with interest at the maximum legal rate. The City argues that because of its financial condition the ALJ's order is punitive.

We are cognizant of the City's current financial difficulties.[5/] However, as we have previously held, a make-whole remedy is not rendered inappropriate because compliance may

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[5/]A municipal assistance corporation for the City has been created by the Legislature. See Public Authorities Law, Art. 10, §3050 et seq.

or will prove financially difficult for the respondent.[6/] In the private sector, as well, the courts have held that there is

> no authority which would exalt the Company's alleged precarious financial condition over the employees' right to an award of back pay. Manifestly, the remedial provisions of the Act should prevail over this claim, especially when the Company has enjoyed the fruits of its violation.[7/]

An order is punitive or remedial by its nature, not by the financial condition of the respondent which is subjected to that order. A make-whole order is inherently remedial, not punitive. Here, the City has retained, for over a year, one week's pay from each of these unit employees and it has had the use of those funds. That the City may have serious financial concerns does not excuse its violation of §209-a.1(d) of the Act nor require CSEA and the employees it represents to continue to pay for the City's violation of law.[8/] To insulate the City from the standard make-whole order would allow the City to profit from its violation of the Act and would encourage other respondents, when faced with financial difficulties, to simply disregard their

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[6/]Town of Newark Valley and Lawrence Kasmarcik, Highway Superintendent, 16 PERB ¶3102 (1983).

[7/]NLRB v. R.J. Smith Constr. Co., 545 F.2d 187, 93 LRRM 2609, 2613 (D.C. Cir. 1976).

[8/]The City has also lagged the pay of other employees. In a recent decision involving the City's police officers, the Appellate Division, Third Department rejected the City's claim that its "unprecedented financial condition" permitted it to avoid its obligations to those employees. The City was sanctioned in the amount of $1,000 for "its pursuit of a patently meritless appeal." Troy Police Benevolent and Protective Ass'n Inc. v. City of Troy, No. 74888 (3d Dep't Jan. 25, 1996).

statutory obligations, a result which is entirely inconsistent with the purposes and policies of the Act. This same rationale applies to the ALJ's order requiring the City to compensate certain unit members for the thirty minutes each day they worked and were prohibited from taking a break. That order is also inherently remedial in nature.

The City also argues that the ALJ's order constitutes a windfall to unit employees because CSEA did not establish either that every unit employee used thirty minutes of break time during the workday prior to its memorandum prohibiting breaks or that every unit member thereafter refrained from taking a thirty-minute break during the workday. The ALJ found, and the record supports the finding, that there was a long-standing practice of unit employees having thirty minutes of break time each workday and that from the time of the City's prohibition, unit employees did not utilize that break time.[9/] The City's memorandum prohibiting breaks was directed to all employees and the City introduced no evidence to establish that the practice was not unit-wide or that any unit employee had continued to take breaks after the issuance of the City's September 22 memorandum. The ALJ's order properly rescinds the memorandum and restores to unit employees the benefit for which they were eligible before

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[9/]CSEA's witnesses testified that the practice had been ongoing for at least 18 years throughout the unit, including the departments of City clerk, mayor, City council, City manager, corporation counsel, comptroller, public works, civil service commission, treasurer, police department and assessor.

the City's unilateral action. There is no windfall to unit employees who had not previously received the benefit because those who were not entitled to the break time are not made eligible for it under the ALJ's order.[10/] To the extent that the City can establish that there are unit employees who were never eligible for the thirty minutes of break time each day or who, in disregard of the memorandum, continued to take breaks, such evidence may appropriately be submitted to us in a post-order compliance proceeding.

The City also asserts that it is impossible for it to ascertain the identity of those employees who previously used the thirty minutes of break time and have, since its directive abolishing the practice, refrained from taking a break. The issue, however, is not whether any particular unit employee actually took a break or how often. The question is eligibility for the break time. If the employee is within the class eligible for the benefit, the employee is entitled to the remedy for the City's deprivation of that eligibility, whether or not the employee previously exercised that right. All unit employees were denied any break time by the City's memorandum and all unit

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[10/]The City, in the brief it filed in support of its exceptions, argues that, pursuant to the ALJ's order, unit employees will be paid for working 32.5 hours in a 35-hour work week or 35 hours in a 37.5-hour work week. The City's reference in its brief to a contractual work week is not evidenced in the record, nor has the City argued to us or to the ALJ that it was reverting to the contract when it eliminated the breaks. Indeed, the record is devoid of any evidence which would support such an argument, even if it were properly before us.

employees are to be compensated for the time they were required to work contrary to practice, subject to the City's proof hereafter that certain individuals in the unit were never eligible for breaks or that eligible employees took breaks notwithstanding the City's prohibition. The mere possibility that select individuals in the unit were never eligible for breaks or that others on occasion disregarded the prohibition is no reason to deny compensation to what is surely the overwhelming majority of eligible unit employees who obeyed the City's directive.[11/]

In its cross-exception, CSEA argues that the reinstatement of break time and compensation for the loss of that time should be applicable to all unit employees because the City's memorandum prohibiting employees from taking breaks was directed to all unit employees and that the record establishes a unit-wide practice. The ALJ tailored the order to the departments about which CSEA had offered testimony. However, the practice as found and as evidenced by the record, is long-standing and widespread throughout the unit represented by CSEA. That a department or group of employees within the unit who had also been eligible for and enjoyed the benefit might not have been specifically referenced on the record does not necessitate a finding that they are not entitled to restoration of and compensation for the

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[11/] Village of Buchanan, 22 PERB ¶3001 (1989); City of Rochester, 21 PERB ¶3040 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

benefit that was denied by the City's unilateral action. We read the ALJ's order as requiring the restoration of the benefit and compensation for the loss of that benefit to all unit employees who had previously been eligible for the benefit. To the extent that the listing of City departments in the ALJ's decision and order could be read as limiting the benefit to unit employees working in those departments only, the ALJ's decision and order is modified to include all unit employees who were prohibited from utilizing that break time after the City's September 22, 1994 memorandum.

Based on the foregoing, the City's exceptions are denied, CSEA's cross-exception is granted, and the ALJ's decision is affirmed, as modified.

IT IS, THEREFORE, ORDERED that the City immediately:

1. Rescind the lag and bi-weekly payroll which was effectuated pursuant to the City's memorandum of September 23, 1994.
2. Reinstate the weekly payroll.
3. Make all current and former bargaining unit employees whole for any pay which was "lagged", with interest at the currently prevailing maximum legal rate.
4. Rescind the memorandum dated September 22, 1994, which discontinued breaks for all CSEA unit employees.
5. Restore to all CSEA unit employees the practice of allowing a break from work of either fifteen minutes each in the morning and fifteen minutes in the afternoon, or thirty minutes in the morning.

6. Make all CSEA unit employees whole for the thirty minutes each day they worked and were prohibited from taking a break, with interest at the currently prevailing maximum legal rate, from September 22, 1994.
7. Provide CSEA with the information it requested relating to the layoff of unit employees on October 13, 1994.
8. Restore CSEA representatives' access to City Hall to post and distribute notices and information in furtherance of its duty to represent unit employees.
9. Not discriminate against CSEA representatives for exercising their right of access to City Hall.
10. Sign and post the attached notice at all work locations ordinarily used to post notices of information to employees in the unit represented by CSEA.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the City of Troy (City) in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Rensselaer County Local 842, City of Troy Unit (CSEA) that the City will immediately:

1. Rescind the lag and bi-weekly payroll which was effectuated pursuant to the City's memorandum of September 23, 1994.

2. Reinstate the weekly payroll.

3. Make all current and former bargaining unit employees whole for any pay which was "lagged", with interest at the currently prevailing maximum legal rate.

4. Rescind the memorandum dated September 22, 1994, which discontinued breaks for all CSEA unit employees.

5. Restore to all CSEA unit employees the practice of allowing a break from work of either fifteen minutes each in the morning and fifteen minutes in the afternoon, or thirty minutes in the morning.

6. Make all CSEA unit employees whole for the thirty minutes each day they worked and were prohibited from taking a break, with interest at the currently prevailing maximum legal rate, from September 22, 1994.

7. Provide CSEA with the information it requested relating to the layoff of unit employees on October 13, 1994.

8. Restore CSEA representatives' access to City Hall to post and distribute notices and information in furtherance of its duty to represent unit employees.

9. Not discriminate against CSEA representatives for exercising their right of access to City Hall.

Dated . . . . . By . . . . . .
(Representative) (Title)

CITY OF TROY

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

3A- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,,

Petitioner,

-and- **CASE NO. C-4384**

CITY OF NORWICH,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All senior account clerk/typists, senior typists and planner trainees.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3B- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4455

TOWN OF CLARENCE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Senior Clerk, Clerk Typist, Senior Clerk Typist, Water District Clerk, Building & Zoning Clerk (Assistant Zoning Officer), Building

Inspector, Assessment Clerk, 2nd Deputy Receiver of Taxes, Animal Control Officer, Assistant Animal Control Officer, Computer Operator, Real Property Appraiser and Laborer (Custodian).

Excluded: Assessor, Court Clerk, Senior Clerk (Secretary to Town Supervisor), Senior Clerk (Secretary to Town Board/Town Attorney), Bookkeeper, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

30- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4457

MASSENA HOUSING AUTHORITY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Building Maintenance Worker, Youth Activities Coordinator, Youth Activities Aide, Tenant Relations Assistant, Keyboard Specialist (FT),

Keyboard Specialist (PT), Modernization Coordinator, and Cleaner

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3D- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW PALTZ POLICE ASSOCIATION,

Petitioner,

-and- **CASE NO. C-4413**

TOWN OF NEW PALTZ,

Employer,

-and-

NEW PALTZ POLICE DEPARTMENT LOCAL, UNITED FEDERATION OF POLICE OFFICERS, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the New Paltz Police Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the

settlement of grievances.

Unit: Included: All part-time and full-time Dispatchers and Senior Dispatchers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the New Paltz Police Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3E- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JEFFERSON-LEWIS-HAMILTON-HERKIMER-ONEIDA BOCES PROFESSIONAL ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4364

JEFFERSON-LEWIS-HAMILTON-HERKIMER-ONEIDA BOCES,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Jefferson-Lewis-Hamilton-Herkimer-Oneida BOCES Professional Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All professional teaching employees, and Adult Education Specialist, COTA, CPTA, Nurse, School Social Worker, Occupational Therapist, and Physical Therapist.

Excluded: Superintendent, Assistant Superintendents, Directors, Assistant Directors, Coordinators, Coordinator Assistants, Supervisors who spend more than fifty percent of their time in an administrative capacity, Career Education Counselor, Project Charlie Specialist, and Placement Specialist.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Jefferson-Lewis-Hamilton-Herkimer-Oneida BOCES Professional Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3F- 1/31/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS COUNCIL 424,

Petitioner,

-and- **CASE NO. C-4428**

COUNTY OF ONEIDA,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 833,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 has been designated and selected by a majority of the employees of the above-named public employer, in the units agreed upon by the parties and described below, as their exclusive representative for the purpose of collective

negotiations and the settlement of grievances.

Unit A White Collar (Administrative) Unit:

Included: See attachment A.

Excluded: All other employees.

Unit B Blue Collar (Operational) Unit:

Included: See attachment B.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

ATTACHMENT A

White Collar (Administrative) Unit

Account Clerk
Account Clerk Typist
Accounting Supervisor
Accounting Supervisor Grade B
**Administrative Asst
Administrative Officer
Alcoholism Counselor Trainee
Alcoholism Counselor I
Alcoholism Counselor II
Alcoholism Counselor III
Assoc Employment & Training Coord
Assoc Planner
Assoc Graphic Artist
Assistant Building Superintendent (MVCC)
Asst Motor Vehicle Bureau Supervisor
Auditor
Auditor 1
Auditor 3
Automotive Mechanic (MVCC)
Activity Therapist
Building Maintenance Helper (MVCC)
Building Maintenance Mechanic (MVCC)
Building Maintenance Worker (MVCC)
Building Maintenance Supervisor (MVCC)
Building Superintendent (MVCC)
Buyer
Campus Security Officer (MVCC)
CAP Coordinator
CAP Nurse
CAP Social Worker
Case Supervisor Grade A
Case Supervisor Grade B
Caseworker
Cashier
Chief Social Welfare Examiner
Child & Family Specialist
Clerk
Clerk Typist
Central Stores Clerk
Community Service Aide
Community Service Worker
Community Service Worker (Spanish Speaking)
Computer Programming Technician
Computer Operator
* Confidential Investigator
* Confidential Support Investigator
* Contract Administrator
Crisis Intervention Counselor
Customer Relations Supervisor
Data Entry Machine Operator
* Director of Data Processing Services
Director of Records Management
Disbursements Officer

White Collar (Administrative) Unit

Printing Supervisor
Probation Asst
Probation Officer
Probation Supervisor
Program Analyst
Psychology Intern
Public Health Engineer
Public Health Sanitarian
Public Health Technician
Purchasing Agent (MVCC)
Research Specialist
Real Property Tax Service Coord.
Resource Investigator
Social Service Investigator
Secretary to Real Property Tax Service
Social Welfare Examiner
Social Work Asst
Sr Account Clerk
Sr Account Clerk Typist
Sr Administrative Asst
Sr Audit Clerk
Sr Building Maintenance Mechanic (MVCC)
Sr Buyer
Sr Caseworker
Sr Clerk
Sr Computer Operator
* Sr Confidential Investigator
Sr Data Entry Machine Operator
Sr Draftsman
Sr E&T Coord
Sr E&T Counselor
Sr Nutrition Outreach Worker
Sr Payroll Clerk
Sr Planner
Sr Probation Officer
Sr Public Health Sanitarian
Sr Social Welfare Examiner
Sr Stenographer
Sr Support Collector
Sr Support Investigator
Sr Tax Map Technician
Sr Typist
Stenographer
Stop-DWI Program Administrator
Storekeeper (MVCC)
Substance Abuse Counselor Trainee
Substance Abuse Counselor I
Substance Abuse Counselor II
Substance Abuse Counselor III
Support Investigator
Supervisor of Building Service (MVCC)
Supervising Campus Security Officer (MVCC)
Supervising CAP Nurse

Blue Collar (Operational) Unit

Mason
Medical Transcriber
Nursing Asst
Occupational Therapy Asst
Painter
Physical Therapy Aide
Recreation Therapist
Residential Activity Facilitator
Sewer Maintenance Equipment Operator
Sewer Maintenance Foreman
Sign Maintenance Worker
Sr Building Maintenance Helper
Sr Custodian
Sr Lab Tech (Water Pollution Control)
Sr Water Pollution Control Operator
Store Keeper
Sewage Treatment Plant Attendant
Sewage Treatment Plant Electrician
Sewage Treatment Plant Maintenance Helper
Sewage Treatment Plant Maintenance Supervisor
Sewage Treatment Plant Maintenance Worker
Substance Abuse Aide
Superintendant Airport Maintenance
Supervising Building Maintenance Helper
Supervising Residential Activity Facilitator
Telephone Operator
Ward Clerk
Water Resource Chemist
Working Foreman
Water Pollution Control Operator

5A- 1/31/96

PROPOSED RULES
(deletions are in brackets; additions are underlined)

Amend section 201.2(b) to read as follows:

[Notwithstanding section 201.4 of this Part, a] A petition may be filed at any time by a public employer or a recognized or certified employee organization to clarify whether a [new or substantially altered] position is encompassed within the scope of an existing unit, (hereafter called a unit clarification petition), or to determine the unit placement of a [new or substantially altered] position (hereafter called a unit placement petition). [A unit clarification petition may be filed either upon the consent of the parties or upon a showing that petitioner could not have filed a timely petition pursuant to section 201.3 of this Part. A unit placement petition may only be filed upon a showing that petitioner could not have filed a timely petition pursuant to section 201.3 of this Part.] The filing and processing of the petition shall be in accordance with sections 201.5(c), 201.5(d), 201.7(a) and (d), 201.8, 201.9(a)-(f) and 201.11 of this Part. Section 201.4 of this Part shall not apply. In determining the unit placement of [any new or substantially altered] a position, the director shall consider whether the placement would be consistent with the criteria set forth in section 207 of the act. The director may decline to make any clarification or placement not otherwise consistent with the purposes or policies of the act. Exceptions to any determination of the director may be filed pursuant to section 201.12 of this Part.

Amend section 201.3(a) to read as follows:

A petition for certification may be filed between 30 and [60] 120 days after a public employer has been asked to recognize an employee organization, if the request has not been denied and no employee organization has been recognized or certified as majority representative of any of the employees within the unit alleged to be appropriate; provided, however, that the petition may be filed by the public employer within such 30 days. Unless filed by a public employer, such a petition shall be supported by a showing of interest of at least 30 percent of the employees within the unit alleged to be appropriate.

Amend section 201.4(b) to read as follows:

(b) In determining whether the evidence submitted to establish a showing of interest is timely, the director will accept evidence of dues deduction authorizations which have not been revoked, evidence of current membership, original designation cards or petitions which were signed and dated within six months of the submission, or a combination of the three. Designation cards shall be submitted in alphabetical order.

That part of any showing of interest consisting of signed and dated employee petitions submitted on or after January 1, 1996 shall be submitted on a form prescribed by the director, which shall include the name of the petitioner, the unit alleged by the petitioner to be appropriate, and shall represent that the showing of interest is in support of the certification and/or decertification petition as applicable.

The director may require that an alphabetized listing of the names of the signatories on individually signed and dated petitions be filed within a reasonable period of time after submission of the showing of interest petitions. If such an alphabetized listing is required, the person or persons filing the listing shall simultaneously file with the director a signed attestation that the listing sets forth only the names of the signatories on the showing of interest petitions.

Amend section 201.4(d) to read as follows:

A declaration of authenticity, signed and sworn to before any person authorized to administer oaths, shall be filed by the petitioner or movant with the director simultaneously with the filing of the showing of interest or any evidence of majority status for the purpose of certification without an election, pursuant to section 201.9(g)(1) of this Part. Such declaration of authenticity shall contain the following:

(1) the name of the individual executing the declaration, and a statement of the declarant's authority to execute it; if on behalf of an employee organization, the declarant's position with the employee organization, and a statement of the declarant's authority to execute the declaration on its behalf; and

(2) a declaration that, upon the declarant's personal knowledge, or inquiries that the declarant has made, the persons whose names appear upon the evidence submitted have themselves signed such evidence[s] on the dates specified thereon, [and] the persons specified as current members are in fact current members[.], and that inquiry was made of all signatories to the evidence submitted regarding their inclusion in any existing negotiating unit which is the subject of the representation petition. If the declaration is upon inquiries the declarant has made, and not upon the declarant's personal knowledge, the declarant shall specify the nature of those inquiries.

Add a new section 201.5(e) to read as follows:

Notice of filing of application. In any case in which the director determines that notice in accordance with this section may be reasonably given by a party filing a petition for certification or a petition under section 201.2(b) of this Part, which seeks a review of a managerial or confidential designation made pursuant to section 201.10 of this Part, that party shall mail notice thereof in conformity with the director's determination to each managerial or confidential designee named in the petition and state in writing to the director that it has mailed the notice of filing in accordance with this section. The notice shall include the date the petitioner filed the petition with the director and a copy of the petition and such attachments thereto as pertain to the named designee.

Amend section 201.9(a)(1) to read as follows:

Investigation. Subsequent to the filing of a petition, the director shall direct an investigation of all questions concerning representation, including, if applicable, whether the showing of interest requirement, as set forth in sections 201.3 and 201.4 of this Part, has been met; whether more than one employee organization seeks to represent some or all of the employees in the allegedly appropriate unit; and whether there is agreement among the parties as to the appropriateness of the alleged unit[;]. [and whether the parties wish the negotiating representative to have exclusive rights of representation.]

Amend section 201.9(g) to read as follows:

Action by director. After completion of the investigation or hearing, as the case may be, or upon the consent of the parties, the director shall [issue a decision which may direct an election or otherwise] dispose of [the matter] the questions concerning representation.

Amend section 201.9(g)(1) to read as follows:

Certification without an election. If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization, that choice may be ascertained by the director on the basis of dues deduction authorizations and other evidence[s] instead of by an election. In such a case, the employee organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the date of the director's decision recommending certification without an election. The determination by the director that the indications of employee support are not sufficient for certification without an election is a ministerial act and will not be reviewed by the board. The director shall inform all parties in writing if the director determines that the indications of employee support are sufficient for certification without an election. The director's determination in this respect is reviewable by the board pursuant to a written objection to certification filed with the board by a party within five working days after its receipt of the director's notification. An objection to certification shall set forth all grounds for the objection with supporting facts and shall be served on all parties to the proceeding. A response to the objection may be filed within five working days after a party's receipt of the objection. A copy of any response shall be served on all other parties. Section 201.12 of this Part shall not otherwise apply except

paragraphs (b)(1), (d) and (i) thereof.

Amend section 201.9(h)(2) to read as follows:

[Within five working days after a final tally of ballots has been furnished, any] Any party may file with the director an original and four copies of objections to the conduct of the election or conduct affecting the results of the election[.] within five working days after its receipt of a final tally of ballots. Such objections shall contain a [short statement of the reasons therefor.] clear and concise statement of the facts constituting the bases for the objection, including the names of the individuals involved and the time and place of occurrence of each particular act alleged. The objections shall be in writing and be signed and sworn to before any person authorized to administer oaths. Copies of such objections shall simultaneously be served upon each of the other parties by the party filing them, and proof of service shall be filed with the director.

Amend section 201.9(h)(3) to read as follows:

An answer [may] shall be filed within five working days [from service] after receipt of the objections. One copy of the answer shall be served on each party and the original, with proof of service and four copies, shall be filed with the director. The answer[, if submitted,] shall contain a [concise statement of facts in refutation of the objections.] specific admission, denial or explanation of each allegation of the objection and a clear and concise statement of any other relevant facts. The original shall be signed and sworn to before any person authorized to administer oaths.

If a party fails or refuses to file a required answer, such failure or refusal may be deemed to constitute that party's admission of the material facts in the objections and a waiver by that party of a hearing.

Amend section 201.9(h)(4) to read as follows:

If objections are filed to the conduct of the election or conduct affecting the results of the election, or if challenged ballots are sufficient in number to affect the results of the election, the director shall investigate such objections or challenges, or both, and shall [prepare a decision.] take the appropriate action which may include the direction of a hearing in accordance with the provisions of section 201.9(b)-(e) of this Part and the issuance of a decision.

Amend section 201.10(b) to read as follows:

Time for filing of applications. An application may be filed [from the first day of the fourth month through the last day of the fifth month of the fiscal year of the public employer;] at any time; provided, however, that with respect to any persons who are in a unit for which an employee organization has been recognized or certified, only one application which has been processed to completion may be filed during a period of unchallenged representation status.

Amend section 201.11 to read as follows:

Upon completion of proceedings, the director shall issue a decision and submit the record of the case to the board. The record shall include the petition or application, notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, any briefs or other documents submitted by the parties, objections to the conduct of an election or conduct affecting the results of an election, and the decision of the director. Briefs may be filed within such time and upon such terms as the director or the assigned administrative law judge may direct. Reply or supplemental briefs, however denominated, will not be permitted without prior request to and approval by the director or the assigned administrative law judge. Such requests will not be approved unless the opponent's brief properly raises issues for the first time which are material to the disposition of the matter.

Amend section 204.8 to read as follows:

Any party shall be entitled upon request made before the close of a hearing conducted by an administrative law judge designated by the director, to file an original and four copies of a brief or proposed findings of fact and conclusions of law, or both, within such time as fixed by the administrative law judge. The administrative law judge may direct the filing of briefs when the submission of briefs is warranted by the nature of the proceeding or the particular issue therein. Any such brief or proposed findings of fact and conclusions of law filed with the administrative law judge must be accompanied by proof of service of a copy thereof upon all other parties. Reply or supplemental briefs, however denominated, will not be permitted without prior request to and approval by the administrative law judge. Such requests will not be approved unless the opponent's brief properly raises issues for the first time which are material to the disposition of the matter.

Amend section 206.7(a) to read as follows:

After completion of the hearing, or upon the consent of the parties, the administrative law judge, if any, shall submit the case, including his or her report and recommendations, to the board. The record shall include the charge, notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence and any brief or other documents submitted by the parties. The board shall cause the report and recommendations of the administrative law judge, if any, to be delivered to all parties to the proceeding. Briefs may be filed by any party within seven working days after receipt of the report and recommendations of the administrative law judge, if any; provided, however, that the board may extend the time during which briefs may be filed because of extraordinary circumstances. An original and four copies of the briefs shall be filed with the board. Reply or supplemental briefs, however denominated, will not be permitted without prior request to and approval by the board. Such requests will not be approved unless the opponent's brief properly raises issues for the first time which are material to the disposition of the matter.

Add a new Part 211 Subpoenas

Section 211.1 Scope. (a) This Part applies to the agency's issuance of subpoenas to compel the attendance of a person to testify at a hearing conducted by the board or a designee of the board on behalf of a party who is not represented by an attorney of record, subpoenas requiring the production of books, papers, documents or other objects from a municipal corporation or the state, and subpoenas requiring the production of books, papers, documents or other objects on behalf of a party who is not represented by an attorney of record.

(b) Nothing contained herein shall in any way affect the right of any person or entity to issue a subpoena pursuant to law.

Section 211.2 Issuance of subpoenas. All agency subpoenas shall be issued by and at the discretion of the presiding administrative law judge or other presiding officer or agent of the board (hereafter referred to as the ALJ). The ALJ may grant or deny any subpoena request in whole or in part. Requests for a subpoena made within ten working days of a scheduled hearing will not be considered absent good cause shown by the party requesting the subpoena.

Section 211.3 Request for subpoena. (a) The ALJ may issue a subpoena only when the party applying for it submits a written affidavit conforming to the requirements of this Part.

(b) Contents of affidavit for a witness subpoena. Such affidavit must specify: (1) the name and address of each individual for whom the subpoena is sought; and (2) facts sufficient to establish the relevancy of the testimony to be adduced pursuant to the subpoena.

(c) Contents of affidavit for subpoena requiring the production of books, papers, documents or other objects; response. Such affidavit must specify: (1) the books, papers, documents or other objects to be produced pursuant to the subpoena; (2) facts sufficient to establish the relevancy of the materials to be produced; and (3) that a copy of the subpoena request and affidavit has been served upon all other parties. A party may file with the ALJ a response to the subpoena request, with copy to all other parties, within five working days after its receipt of the subpoena request.

Section 211.4 Service of subpoena. (a) The ALJ shall notify all parties as to the disposition of any subpoena request and shall furnish the party requesting the subpoena a completed subpoena form if the request has been granted in any respect.

(b) Service of the subpoena and the payment of appropriate witness fees shall be the responsibility of the requesting party and shall be made as required by law.

Section 211.5 Time and place for production of documents. Any books, papers, documents or other objects ordered pursuant to this Part shall be produced at the date and time specified in the notice of hearing and/or at any adjourned dates as directed by the ALJ unless production of the subpoenaed material at a reasonable time before the scheduled hearing date is necessary in the judgment of the ALJ to avoid unreasonable delay in the commencement of the hearing due to the volume and/or the complexity of the material to be produced.

Section 211.6 Motion to withdraw or modify. (a) Any individual who has been served with a subpoena or any party may file a motion with the ALJ on notice to all parties, to withdraw or modify any subpoena issued pursuant to this Part.

(b) Any such motion must be made as soon as reasonably possible after the issuance of the subpoena so as not to interfere with the processing of the case.

(c) The ALJ upon motion by a party or sua sponte may withdraw or modify a subpoena issued pursuant to this Part for good cause.

(d) Nothing in this section shall in any way affect any rights of any person or entity under law.

Section 211.7 Failure to honor a subpoena. (a) If a party or witness fails without reasonable excuse to comply with a subpoena properly served, the default shall be noted in the record. (b) The ALJ may, in his or her discretion, adjourn all or part of the hearing to allow the party who has requested the subpoena a reasonable opportunity to obtain compliance with the subpoena in accordance with applicable law. The ALJ may also strike from the record the pleadings and/or any testimony offered at the hearing by or on behalf of the person or party which has not complied with the subpoena or is responsible for the noncompliance, may strike those portions of the testimony which are related to the matter called for in the subpoena, or may take such other action as is appropriate.